

REMARKS

Applicants respectfully request reconsideration of the present application in view of the following remarks. Claims 1-24 are pending.

In the final office action, the Examiner responded to anticipation and enablement arguments submitted by Applicants on November 9, 2004. As to the anticipation issue, the Examiner stated:

*The Applicant argues that "Icecast" does not disclose **initiating transfer of the media data from the datastore to a server system on which the Stream Server selected by the Stream Server Portal is installed**. The Examiner does not agree. "Icecast" discloses this limitation (page 13, section "Source", the text "Static file streamers simply reads the bit rate of the file it is going to send. . .").*

The Examiner is thus asserting that the active step of initiating a transfer, as required by claim 1, is met by the disclosed "Icecast" step of reading a bit rate. Because measuring a transfer rate (i.e., bit rate) is not one and the same thing as initiating a transfer of data, the text cited by the Examiner still fails to disclose the initiating transfer step required by claim 1.

The fact that a transfer of data may imply that initialization of the transfer has taken place is not enough to prove anticipation of the claim because that initialization must be disclosed by the cited reference in the manner recited by the claim. Applicants submit that the Icecast reference does not disclose "initiating transfer of the media data from the datastore to a server system on which the Stream Server selected by the Stream Server Portal is installed," as required by claim 1.

In the Office Action, the Examiner asserts that the "streamer" in Icecast amounts to the Stream Server Portal of claim 1. According to the Icecast document, a streamer is a program that handles the sending of data to the icecast server and only to that

server. See page 12 of the Icecast document. Among those functions performed by the streamer, none pertains to the selection of a "suitable" Stream Server, as required by claim 1. Further, the Icecast document does not show the sending of data to a server other than the Icecast server, and therefore, there is no need for the streamer to select such suitable server, as required by claim 1. At least for the foregoing reasons, the Icecast document does not disclose each and every element of claim 1. Therefore, Applicants respectfully submit that the claim is not anticipated by the Icecast document and respectfully request that the claim should be allowed.

As to the enablement issue, the Examiner cited case law to support the position that the Icecast document is an enabling disclosure:

"A reference contains an "enabling disclosure" if the public was in possession of the claimed invention before the date of invention." In re Donohue, 766 F.2d 531, 226 USPQ 619 (Fed. Cir. 1985).

Yet the Examiner omitted from citing a sentence in the case directly following that cited text:

"Such possession is effected if one of ordinary skill in the art could have combined the publication's description of the invention with his [or her] own knowledge to make the claimed invention." Id.

The cited case law does not relate to evidence of physical possession of the invention by the public, such as is the case when a user gets a copy of software through a download or other means. Instead, the law requires "possession" in the sense that a prior art publication fully describing the invention has to be published before the date of the invention, not just made available to the public. Consequently, the fact that software associated with Icecast has been released before the filing date of the present application is irrelevant for Examination purposes.

The Icecast server document does not include any figures, active steps, flow charts, block diagrams, or even any hints whatsoever instructing a person of ordinary skill in the art how to recreate the claimed invention. Because a person of ordinary skill in the art could not have made the claimed invention without undue experimentation by just considering the Icecast server document, that document is not an enabling prior art reference.

In view of the foregoing, Applicants earnestly solicit the expedited allowance of the pending claims. The Commissioner is hereby authorized to charge any fee(s) necessary to enter this paper and any previous paper, or credit any overpayment of fees to deposit account 09-0468.

Respectfully submitted,

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